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Pyu Pyu Ma v Dr Lim Soo How & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-83–09 OF 2016
MOHD FIRUZ J
9 JANUARY 2019

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Damages — Assessment — Tort — Special damages — Cost of medical treatment — Claim for travelling expenses — Cost of colostomy bags — Loss of earnings — Claim for value of care — General damages — Pain and suffering and loss of amenities

D

Tort — Negligence — Medical negligence — Whether plaintiff suffered any injury as claimed — Whether injuries suffered by plaintiff result of unavoidable complication — Whether defendants acted with due care and skill in attending to plaintiff — Whether defendants took appropriate measures to deal with complications which arose — Whether diagnosis, management, care, treatment and advice provided to plaintiff in accordance with generally approved and accepted procedure among medical practitioners — Whether binding contractual relationship existed between plaintiff and seventh defendant

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The plaintiff was a Rohingya refugee who had been in Malaysia since 2011. Being a United Nation High Commissioner for Refugees ('UNHCR') cardholder, she was entitled to subsidised health care at the Klang Hospital ('the hospital'). On 9 August 2014, the plaintiff was admitted to the labour ward of the hospital. Due to the slow progress of her labour, the doctors decided to hasten the same by augmenting it with oxytocin. The plaintiff successfully delivered a baby boy weighing 3.25kg at 2.10pm on 11 August 2014. Based on the hospital records, it was recorded that an episiotomy incision was made to facilitate delivery. Post-delivery, the episiotomy was sutured. Following resuturing, staff nurse Miharlia ('the third defendant') discovered that there were pockets in the anus. Dr Uma Mariappen ('the fourth defendant') examined the plaintiff at 4.10pm and found third or fourth degree tear on the plaintiff, but nonetheless decided to refer her for examination under anesthesia. Dr Nor Azhana Mohamed ('the fifth defendant') attended to the plaintiff and found perineal injuries of a serious nature. A general surgeon, Dr Muhammad Azhar ('the sixth defendant') found the plaintiff's perineal area contaminated, inlamed and the perineal tissues friable. A decision was made to undertake an open repair of the perineal injuries and for a colostomy. Post-surgery, the plaintiff regained consciousness and found a colostomy opening in her abdomen into which feces were drained. The plaintiff was

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concerned on the cost of the surgical procedures and the time for her to recover. Based on hospital records, both the plaintiff and her husband were duly given the explanation sought and counselling. The plaintiff was successfully discharged on 20 August 2014 and a few days later found her perineal injuries painful and with discharge of pus. The plaintiff sought treatment at a general practitioner clinic in Meru by Dr Ghanti Karuppiah ('PW3'). PW3 found the perineal wound infected prompting him to remove the sutures, cleaned the wound and gave the plaintiff antibiotics. The plaintiff thereafter continued to attend follow up consultations at both the obstetrics and gynecology clinic and the surgical clinic respectively at the hospital wherein the surgical clinic managed the colostomy and the rectal injuries whereas the obstetrics and gynecological clinic managed her perineal injuries. The plaintiff was given contraceptive injections to prevent pregnancy. It was done despite the plaintiff informing the doctors that she had not had sexual intercourse with her husband due to the severe perineal injuries that she was recovering from. The plaintiff testified that the contraceptive injections affected her menstrual cycle and caused irregular bleeding. Notwithstanding the fact that the plaintiff was scheduled for reversal of the colostomy on 14 November 2014, procedure was postponed as the sixth defendant was of opinion that the plaintiff's anal tone was not strong enough to undergo reversal surgery. However, despite a successful reversal surgery, the plaintiff alleged that she suffered the sequelae of the injuries and would likely do so for the rest of her life. The issues determined were as follows: (a) whether the plaintiff suffered any injury as claimed; (b) whether the injuries suffered by the plaintiff was the result of unavoidable complication; (c) whether the defendants had acted with due care and skill in attending to the plaintiff; (d) whether the defendants took appropriate measures to deal with complications which arose; (d) whether the diagnosis, management, care, treatment and advice provided to the plaintiff was in accordance with the generally approved and accepted procedure among medical practitioners; (e) whether a binding contractual relationship existed between the plaintiff and government of Malaysia, the seventh defendant; and (f) whether the plaintiff was entitled to the special damages, general damages, interest and costs as pleaded.

Held:

(1) The fact that the plaintiff had suffered a fourth degree tear was confirmed by the sixth defendant who found a fourth degree perineal tear and a buttonhole tear at the rectum (see para 31).

(2) There was insufficient evidence to show that the plaintiff's injuries were a result of unavoidable complication as contended by the defendants. Despite the expert evidence on what might cause the plaintiff's injuries, it was not convinced that the injuries suffered by the plaintiff was part of a normal process of labour of a baby (see para 32).

(3) At the delivery stage, the evidence found that there was negligence as none of the defendants who conducted delivery of the plaintiff's baby knew how the fourth degree tear was caused. At the post-delivery stage which included the suturing of the episiotomy wound and the examination of the injuries, the court disagree with the defendant's contention that there was no delay in sending the plaintiff for examination. There was a delay in recognising the fourth degree tear suffered by the plaintiff. The delay caused the plaintiff's vaginal tissue inflamed, contaminated and friable and made the procedure of primary repair difficult. The defendant had not acted with the standard due care and skill required under the *Bolam* test. As for the post examination stage, the third defendant did not give adequate advice and information to the plaintiff as to the choice of treatment available to the plaintiff (see paras 34–35 & 38–41).

(4) With the exception of putting the plaintiff on contraceptives despite her informing the attending doctors that she was not able to have sex with her husband since after giving birth, the defendants had taken appropriate measures to deal with the complications. It included the counselling sessions to the plaintiff and her husband after the colostomy procedure wherein the counselling sessions continued until the reverse colostomy procedure (see para 43).

(5) The second, third defendant, and sixth defendant failed to follow the Klang Hospital's Guidelines and Operating Procedure when they failed to protect the plaintiff's perineum to prevent the possibility of an extended tear. The first defendant failed to adhere the guidelines when she performed re-suturing upon discovery of the pocket in the plaintiff's anus instead of having the tear examined by a senior medical officer or specialist prior to re-suturing. With the exception of the failure to explain the treatment options available to the plaintiff, it was of the view that the diagnosis, management, care, treatment and advice provided to the plaintiff by the fifth to the seventh defendants was in accordance with the generally approved and accepted procedure among medical practitioners of the relevant specialties practicing in Klang, Selangor in 2014 (see paras 44–48).

(6) As the ultimate owner of the hospital, the seventh defendant had a direct duty to ensure the safety of the plaintiff (see para 50).

(7) The plaintiff was entitled to the special damages, general damages, interest and costs as pleaded. For the special damages, the plaintiff was entitled to the cost of medical treatment of RM2,409.50, the travelling expenses of RM1,500, the cost of colostomy bags, 50% claim for loss of earnings and the claim of value of care for eight months. For the general damages, the lump sum of RM250,000 was awarded to the plaintiff in respect of pain and suffering, loss of amenities for seven months and the

permanent scars in the plaintiff's perineum and abdomen and for the aggravated damages, the sum of RM75,000 (see paras 52, 55–59 & 67–70).

[Bahasa Malaysia summary

Plaintif adalah pelarian Rohingya yang telah berada di Malaysia sejak tahun 2011. Sebagai pemegang kad Pesuruhjaya Tinggi Pertubuhan Bangsa-Bangsa Bersatu untuk Pelarian ('UNHCR'), dia berhak mendapat penjagaan kesihatan bersubsidi di Hospital Klang ('hospital'). Pada 9 Ogos 2014, plaintif dimasukkan ke wad bersalin hospital. Kerana kemajuan perlahan bersalinnya, doktor memutuskan untuk mempercepatkannya dengan pemberian dengan oxytocin. Plaintif berjaya melahirkan seorang bayi lelaki dengan berat 3.25kg pada jam 2.10 petang pada 11 Ogos 2014. Berdasarkan rekod hospital, ia direkodkan bahawa pemotongan episiotomi dibuat untuk memudahkan kelahiran. Selepas kelahiran, episiotomi itu dijahit. Berikutan jahitan, kakitangan jururawat Miharlia ('defendan ketiga') mendapati bahawa terdapat poket di dubur. Dr Uma Mariappen ('defendan keempat') memeriksa plaintif pada 4.10 petang dan menemui koyakan tahap ketiga atau keempat pada plaintif, namun tetap memutuskan untuk merujuknya untuk pemeriksaan di bawah anestesia. Dr Nor Azhana Mohamed ('defendan kelima') menangani plaintif dan mendapati kecederaan perineal yang serius. Pakar bedah am, Dr Muhammad Azhar ('defendan keenam') mendapati kawasan perineal plaintif yang tercemar, meradang dan tisu perineal terkoyak. Keputusan dibuat untuk melakukan pembaikan terbuka terhadap kecederaan perineal dan untuk kolostomi. Selepas pembedahan, plaintif kembali sedar dan mendapati pembukaan kolostomi di dalam perutnya di mana najis disalurkan. Plaintif bimbang dengan kos prosedur pembedahan pada masa itu untuk penyembuhannya. Berdasarkan rekod hospital, kedua-dua plaintif dan suaminya telah diberi penjelasan dan mendapatkan kaunseling. Plaintif telah berjaya dikeluarkan pada 20 Ogos 2014 dan beberapa hari kemudian mendapati kecederaan perinealnya menyakitkan dan dengan pengeluaran nanah. Plaintif mendapatkan rawatan di sebuah klinik doktor di Meru oleh Dr Ghanti Karuppiah ('PW3'). PW3 mendapati luka perineal bernanah mendorongnya untuk mengeluarkan jahitan, membersihkan luka dan memberikan antibiotik kepada plaintif. Plaintif selepas itu terus menghadiri perundingan susulan di kedua-dua klinik obstetrik dan ginekologi dan klinik pembedahan masing-masing di hospital di mana klinik pembedahan menguruskan kolostomi dan kecederaan rektum manakala klinik obstetrik dan ginekologi menguruskan kecederaan perinealnya. Plaintif diberikan suntikan kontraseptif untuk mencegah kehamilan. Ia dilakukan walaupun plaintif memaklumkan kepada doktor bahawa dia tidak pernah bersetubuh dengan suaminya kerana kecederaan perineal yang teruk yang dia sedang pulih. Plaintif memberi keterangan bahawa suntikan kontraseptif menjejaskan kitaran haid dan menyebabkan pendarahan tidak teratur. Walaupun hakikat bahawa plaintif dijadualkan untuk pembalikan kolostomi pada 14 November 2014,

prosedur ditangguhkan kerana defendan keenam berpendapat bahawa keadaan dubur plaintif tidak cukup kuat untuk menjalani pembedahan pembalikan. Walau bagaimanapun, walaupun terdapat pembedahan pembalikan yang berjaya, plaintif mendakwa bahawa dia mengalami kecederaan lanjutan dan kemungkinan akan mengalaminya sepanjang hayatnya. Isu-isu yang ditentukan adalah seperti berikut: (a) sama ada plaintif mengalami sebarang kecederaan seperti yang didakwa; (b) sama ada kecederaan yang dialami oleh plaintif adalah hasil daripada komplikasi yang tidak dapat dielakkan; (c) sama ada defendan telah bertindak dengan penjagaan dan kemahiran dalam menangani plaintif; (d) sama ada defendan mengambil langkah yang sesuai untuk menangani komplikasi yang timbul; (e) sama ada diagnosis, pengurusan, penjagaan, rawatan dan nasihat yang diberikan kepada plaintif adalah mengikut prosedur am yang diluluskan dan diterima di kalangan pengamal perubatan; (f) sama ada hubungan kontrak yang mengikat wujud antara plaintif dan kerajaan Malaysia, defendan ketujuh; dan (g) sama ada plaintif berhak mendapat ganti rugi khas, ganti rugi am, faedah dan kos sebagaimana yang diplid.

Diputuskan:

(1) Hakikat bahawa plaintif telah mengalami koyakan tahap empat telah disahkan oleh defendan keenam yang menemui koyakan perineal tahap empat dan koyakan buttonhole pada lubang rektum (lihat perenggan 31).

(2) Terdapat keterangan yang tidak mencukupi untuk menunjukkan bahawa kecederaan plaintif adalah hasil daripada komplikasi yang tidak dapat dielakkan seperti yang dikemukakan oleh defendan. Walaupun terdapat keterangan pakar tentang apa yang mungkin menyebabkan kecederaan plaintif, ia tidak meyakinkan bahawa kecederaan yang dialami oleh plaintif adalah sebahagian daripada proses kelahiran normal seorang bayi (lihat perenggan 32).

(3) Pada peringkat kelahiran, keterangan mendapati terdapat kecuaian kerana tidak ada seorang defendan yang mengendalikan kelahiran anak plaintif tahu bagaimana koyakan tahap keempat terjadi. Pada peringkat selepas kelahiran yang termasuk menjahit luka episiotomi dan pemeriksaan kecederaan, mahkamah tidak bersetuju dengan pendapat defendan bahawa tidak ada kelewatan dalam menghantar plaintif untuk diperiksa. Terdapat kelewatan dalam mengenal pasti koyakan tahap empat yang dialami oleh plaintif. Kelewatan itu menyebabkan tisu vagina plaintif meradang, tercemar dan terkoyak dan membuat prosedur pembaikan utama sukar. Defendan tidak bertindak dengan penjagaan dan kemahiran yang wajar yang diperlukan di bawah ujian *Bolam*. Bagi peringkat selepas pemeriksaan, defendan ketiga tidak memberikan nasihat dan maklumat yang mencukupi kepada plaintif mengenai

pilihan rawatan yang ada kepada plaintif (lihat perenggan 34–35 & 38–41).

(4) Dengan pengecualian meletakkan plaintif ke atas kontraseptif walaupun dia memaklumkan kepada doktor bahawa dia tidak dapat melakukan hubungan seks dengan suaminya sejak selepas melahirkan, defendan telah mengambil langkah-langkah untuk menangani komplikasi. Ia termasuk sesi kaunseling kepada plaintif dan suaminya selepas prosedur kolostomi di mana sesi kaunseling berterusan sehingga prosedur mencabut kolostomi (lihat perenggan 43).

(5) Defendan kedua, ketiga, dan keenam gagal mengikuti Garis Panduan dan Prosedur Operasi Hospital Klang ketika mereka gagal melindungi perineum plaintif untuk mencegah kemungkinan koyakan lanjut. Defendan pertama gagal mematuhi garis panduan ketika dia melakukan jahitan semula setelah penemuan poket di dubur plaintif, bukannya koyakan yang diperiksa oleh seorang pegawai perubatan senior atau pakar sebelum jahitan semula. Dengan pengecualian kegagalan untuk menerangkan pilihan rawatan yang ada kepada plaintif, adalah berpendapat bahawa diagnosis, pengurusan, penjagaan, rawatan dan nasihat yang diberikan kepada plaintif oleh defendan kelima hingga ketujuh adalah mengikut prosedur yang umumnya diluluskan dan diterima di kalangan pengamal perubatan pakar yang beramal di Klang, Selangor pada 2014 (lihat perenggan 44–48).

(6) Sebagai pemilik utama hospital, defendan ketujuh mempunyai tugas langsung untuk memastikan keselamatan plaintif (lihat perenggan 50).

(7) Plaintif berhak menerima ganti rugi khas, ganti rugi am, faedah dan kos sebagaimana yang diplid. Untuk ganti rugi khas, plaintif berhak kepada kos rawatan perubatan sebanyak RM2,409.50, perbelanjaan perjalanan RM1,500, kos beg kolostomi, 50% tuntutan kehilangan pendapatan dan tuntutan nilai penjagaan selama lapan bulan. Untuk ganti rugi am, jumlah sekali gus sebanyak RM250,000 telah diberikan kepada plaintif berkenaan dengan kesakitan dan penderitaan, kehilangan kemudahan selama tujuh bulan dan parut kekal di perineum dan perut plaintif dan bagi ganti rugi teruk, jumlah sebanyak RM75,000 (lihat perenggan 52, 55–59 & 67–70).]

Notes

For cases on medical negligence, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1657–1676.

For cases on tort, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 338–343.

Cases referred to

A v Bottrill [2003] 1 AC 449, PC (folld)
Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (refd)
Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority [1997] 4 All ER 771, HL (refd)
Bull and Another v Devon Area Health Authority (1993) 4 Med LR 117, CA (refd)
Cassell & Co Ltd v Broome and another [1972] AC 1027, HL (folld)
Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2017] 1 LNS 2112, FC (refd)
Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529, FC (refd)
Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor [2012] 4 MLJ 260; [2013] 1 CLJ 699, HC (distd)
Lybert v Warrington Health Authority (1996) 7 Med LR 71, CA (refd)
Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282, FC (refd)
Rogers v Whitaker (1993) 4 Med LR 79, HC (refd)
Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals [2017] 4 MLJ 102; [2017] 3 CLJ 311, CA (refd)
Rookes v Barnard [1964] AC 1129, HL (folld)
Sheela Christina Nair v Regency Specialist Hospital Sdn Bhd & Ors [2016] MLJU 1899; [2016] 9 CLJ 267, HC (folld)
Tay Lye Seng & Anor v Nazori bin Teh & Anor [1998] 3 MLJ 873, CA (refd)
Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292, FC (folld)
Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438, FC (folld)

Legislation referred to

Civil Law Act 1956 s 11
Rules of Court 2012 O 40, O 42 r 12

PS Ranjan (Karthi with him) (PS Ranjan & Co) for the plaintiff.
Azlina bt Mahmud (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Mohd Firuz J:

[1] This is the decision of the court in respect of the plaintiff's claim for medical negligence.

A CHRONOLOGICAL BACKGROUND

[2] The plaintiff is a Rohingya refugee who has been in Malaysia since 2011. Being a United Nation High Commissioner for Refugees ('UNHCR') cardholder, she is entitled to subsidised health care at the Klang Hospital ('the B hospital'). This meant that she had to pay charges imposed by the hospital.

[3] On 9 August 2014, the plaintiff was admitted to the labour ward of the hospital. Due to the slow progress of her labour, the doctors decided to hasten the same by augmenting it with oxytocin. C

[4] Shortly thereafter, the plaintiff successfully delivered a baby boy weighing 3.25kg at 2.10pm on 11 August 2014. Based on the hospital records, it was recorded that an episiotomy incision was made to facilitate delivery. Post delivery, the episiotomy wound was sutured. Following re-suturing, staff nurse D Miharlia (the third defendant: DW1) discovered that there were pockets in the anus. This prompted DW1 to consult a senior doctor, obstetrician and gynecologist, Dr Uma Mariappen (the fourth defendant: DW7). DW7 examined the plaintiff at 4.10pm.

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[5] DW7 found no third or fourth degree tear on the plaintiff, but nonetheless decided to refer her for examination under anesthesia. For this purpose, the plaintiff was then sent to the operation theatre at about 6pm. At 7pm, Dr Nor Azhana Mohamed (the fifth defendant: DW8) attended to the F plaintiff. Upon removing the sutures, DW8 found perineal injuries of a serious nature (oasis of her anal sphincter).

[6] DW8 then requested for assistance of a general surgeon, Dr Mohammad Azhar bin Anis Ahmad (the sixth defendant: DW3). Both G DW8 and DW3 found the plaintiff's perineal area contaminated, inflamed and the perineal tissues friable. A decision was made to undertake an open repair of the perineal injuries and for a colostomy to be done. Under the colostomy procedure, the bowel is disconnected from the rectum and brought out to the abdominal wall.

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[7] Post surgery, the plaintiff regained consciousness and found a colostomy opening in her abdomen into which feces were to be drained. She was shocked, upset and demanded an explanation. The plaintiff was also concerned on the cost of the surgical procedures and the time it will take for her I to recover. Based on hospital records, both the plaintiff and her husband were duly given the explanation sought and also counselling.

[8] Subsequently, the plaintiff was successfully discharged on 20 August 2014. However, a few days later, the plaintiff found her perineal injuries to be

extremely painful and with discharge of pus. Due to this, the plaintiff sought treatment. at a general practitioner clinic in Meru, Klang where she was attended to by Dr Ghanti Karuppiah ('PW3').

[9] PW3 found the perineal wound to be infected prompting him to remove the sutures, cleaned the wound and gave the plaintiff antibiotics. A few days later the plaintiff's perineal wound was re-sutured.

[10] The plaintiff thereafter, continued to attend follow up consultations at both the obstetrics and gynecology clinic and the surgical clinic respectively at the hospital wherein the surgical clinic managed the colostomy and the rectal injuries whereas the obstetrics and gynecological clinic managed her perineal injuries.

[11] As the obstetric and gynecological clinic doctors were concerned about a subsequent pregnancy before the wound could heal properly, the plaintiff was given contraceptive injections to prevent pregnancy. This was done despite the plaintiff informing the doctors that she had not had sexual intercourse with her husband due to the severe perineal injuries that she was recovering from.

[12] The plaintiff testified that the contraceptive injections affected her menstrual cycle and caused irregular bleeding. The fear of voiding into a colostomy bag and the fear of soiling herself caused the plaintiff to control her diet so as to lessen the frequency and the volume of voiding.

[13] Notwithstanding the fact that the plaintiff was scheduled for reversal of the colostomy on 14 November 2014, procedure had to be postponed as DW3 was of the opinion that the plaintiff's anal tone was not strong enough to undergo reversal surgery (which was finally undertaken on 20 March 2015). However, despite a successful reversal surgery, the plaintiff alleges that she suffers the sequelae of the injuries to this day and will likely do so for the rest of her life.

THE PLAINTIFF'S PLEADED CASE

[14] The plaintiff's pleaded case is as follows:

(a) the plaintiff's baby's birth weight was wrongly estimated to be between 2.2–2.4kg upon her admission to the Klang Hospital on 9 August 2014;

(b) going by the erroneous estimate, the obstetric team expected a fairly small baby;

(c) the defendants decided to hasten the delivery by augmenting her labour by using oxytocin;

(d) augmentation of labour is known to increase incidences of obstetric anal sphincter injuries ('OASIS');

(e) when the plaintiff was ready to deliver, she was attended to by two inexperienced house officers and two nurses;

(f) one of two house officers decided to undertake an episiotomy incision to widen the vaginal opening;

(g) the house officer did not support the perineum when the baby was being delivered;

(h) the incorrect episiotomy incision coupled with no support to the perineum caused an extended tear of the perineum up to the anal verge, following delivery of a bigger than expected baby weighing 3.25kg;

(i) the house officers and later the nurses attempted to suture and re-suture the extended tear but were not able to secure proper suturing;

(j) the obstetrician and gynecologist, DW7, was informed and she came at around 4.10pm to examine the wound and the sutures;

(k) DW7 did not and could not undertake a proper examination of the perineal injuries;

(l) DW7 was irresponsible enough to make a diagnosis that there was no third or fourth degree tear and that the perineal mucosa was intact;

(m) it was a diagnosis of convenience because she was about to complete her shift, the plaintiff's case would be passed on to the obstetrician and gynecologist who was to come on call after 5pm;

(n) after making an obviously incorrect diagnosis, DW7 instructed for an examination of the injuries to be undertaken under anesthesia in the operating theatre;

(o) despite DW7's instructions for examination under anesthesia at 4.10pm, the plaintiff was sent to the operating theatre only after 6pm;

(p) DW8 who saw the patient only at 7pm removed the sutures and found the injuries to be far more serious than reported;

(q) given the prolonged period of time since the delivery at 2.10pm up to the examination at 7pm, the perineal tissues had become contaminated, inflamed and friable;

(r) DW8 could have undertaken a primary repair of the perineal injuries without the creation of a colostomy. However, she decided to get the opinion of the surgeon, DW3;

(s) both DW8 and DW3 decided that an open repair of the perineal injuries followed by the creation of a colostomy would be the best for the

plaintiff. Both doctors decided to proceed with the said plan without explaining the treatment options available to the plaintiff;

(t) they should have explained the risks and benefits of both the options and allowed the plaintiff to make an informed decision. Instead, their paternalistic approach led them to undertake an open repair of the injuries with the creation of a colostomy;

(u) the creation of the corostomy caused pain and inconvenience and a prolonged period of recovery;

(v) the colostomy was reversed only some seven months after its creation; and

(w) the plaintiff suffered irreversible injuries and continue to suffer from their sequelae. The severity of the injuries suffered puts the plaintiff at an increased risk of suffering anal incontinence in future.

THE DEFENDANTS' CASE

[15] In summary, the defendants' pleaded case is as follows:

(a) during the delivery procedure on 9 August 2014, the second defendant, SN Rozita bt Zainuddin (DW2) found the vaginal opening to be too narrow for the delivery of the baby's head. Therefore, she undertook an episiotomy incision after obtaining the plaintiff's verbal consent and after administering a painkiller injection. The episiotomy involved a medic-lateral approach with an incision length of 2cm;

(b) following delivery, both the DW2 and DW1 identified the episiotomy incision before undertaking suturing;

(c) DW1 gave another painkiller injection before suturing;

(d) when undertaking the suturing, DW1 did a per rectal examination and found pockets in the anus. *DW1 then reopened the sutures and re-sutured the episiotomy wound but still found pockets in the anus*; DW1 then informed the medical officer who in turn called DW7;

(e) DW7 attended to the plaintiff at 4.10pm but was unable to examine the episiotomy wound because the plaintiff was uncooperative; DW7 then ordered an episiotomy repair to be undertaken at the operating theatre;

(f) the plaintiff was sent to the operating theatre at 6pm and was seen by DW8 at 7pm;

(g) DW8 found a fourth degree tear and called in the surgeon DW3 for confirmation of the injury and further treatment;

(h) DW3 examined and confirmed the injuries and decided to undertake the colostomy surgery;

(i) the plaintiff and her husband were given an explanation regarding the need for the colostomy surgery and its risks;

(j) the partial anesthesia given to the plaintiff was then converted to full anesthesia;

(k) DW8 repaired the vaginal injuries after which DW3 repaired the anal injuries and created the colostomy;

(l) on 12 August 2014, the plaintiff and her husband were counseled that a fourth degree tear was a known complication of vaginal delivery and that there were no risk factors identified during the antenatal stage and during the delivery;

(m) on 14 August 2014, a family conference was held where the plaintiff and her husband were counseled that the colostomy would allow the rectal injuries to heal completely and that the colostomy can be reversed in about six weeks;

(n) the plaintiff was discharged home on 20 August 2014 with an appointment for follow up in six weeks. The Plaintiff did not have any complaints during the follow up consultations;

(o) the perineal injuries suffered by the plaintiff was not caused or contributed by the defendants; and

(p) the care and treatment provided to the plaintiff was in accordance with the standard of care that is expected of the defendants.

DECISION AT THE END OF THE TRIAL

[16] Upon reviewing the evidence adduced by both parties, the submissions of learned counsels for both parties (both written and oral), I found the case in favor of the plaintiff.

[17] Dissatisfied with the decision of this court, the first defendant filed their notice of appeal dated 30 January 2019. The following are the grounds of my decision dated 9 January 2019.

AGREED ISSUES TO BE TRIED

[18] In arriving at a decision over the suit, this court had to determine the following nine issues to be tried formulated by both parties:

(a) whether the defendants had acted with due care and skill in attending to the plaintiff;

(b) whether the diagnosis, management, care, treatment and advice provided to the plaintiff by the first to seventh defendants was in

accordance with the generally approved and accepted procedure amongst medical practitioners of the relevant specialties practicing in Klang, Selangor in 2014;

(c) whether the diagnosis, management, care, treatment and advice provided to the plaintiff at the seventh defendant's hospital was in accordance with the generally approved and accepted practice in Malaysia;

(d) Whether a binding contractual relationship existed as between the seventh defendant and the plaintiff;

(e) if a binding contractual relationship existed between the seventh defendant and the plaintiff, whether the seventh defendant had carried out its contractual duties to the plaintiff in a reasonable and responsible manner;

(f) whether the plaintiff suffered any injury as claimed;

(g) whether the injuries suffered by the plaintiff was the result of an unavoidable complication;

(h) if liability is established against the defendants and each of them, whether the plaintiff will be entitled to the special damages, general damages (including as aggravated), interest and costs as pleaded; and

(i) whether the defendants had taken appropriate measures to deal with the complications which arose.

SUMMARY OF THE PLAINTIFF'S SUBMISSION

[19] The plaintiff's submission in respect of medical negligence by the defendants can be summarised as follows:

(a) there was an erroneous estimate of the weight of the baby. This resulted in an unplanned episiotomy procedure;

(b) the episiotomy was wrongly performed by Dr Lim So How (first defendant: DW6). Coupled with the failure to support the plaintiff's perineum, the plaintiff suffered a fourth degree tear;

(c) having discovered the fourth degree tear, (see labour summary at p 165 of Bundle B), DW1 still proceeded to suture and re-suture the episiotomy tear. This was contrary to the Klang Hospital's Guidelines and Operating Procedure which provided all third or fourth degree fears should be examined by a senior medical officer or specialist. In addition, all third or fourth degree tears should be repaired in the theatre;

(d) despite the directions by DW7 for examination to be carried out in the OT being made at 4.10pm, the plaintiff was only sent to the OT at 6pm

and only examined by DW8 at 7pm. This according to the plaintiff amounted to a delay which further caused the plaintiff's injuries to worsen;

(e) after examination of the plaintiff's injuries at about 7pm, the defendant's via DW3 and DW8 did not give sufficient information and/or advice to the plaintiff as to the choice of treatment available to the plaintiff or the risks that comes with the treatment chosen. Instead, the defendant vis a vis DW3 and DW8 had only informed her and her husband of only one procedure namely, colostomy. There was no mention of primary repair at all. In other words, the plaintiff was not given a choice to elect the treatment of her choice. This violated patient's autonomy; and

(f) the advice given to the plaintiff that the duration of the colostomy was between three to six weeks was not accurate as the reverse colostomy would take more than six months. The plaintiff also was never informed as to how the colostomy procedure would affect her daily life.

THE DEFENDANT'S SUBMISSION

[20] Whilst the defendant's written submission on the issue of liability was over 57 pages long, it can be summarised as follows:

(a) there was no negligence on the part of the defendants that resulted in the injuries suffered by the plaintiff. The injury suffered by the plaintiff was a complication that is unavoidable during delivery (see para 7.1 onwards beginning at p 51 of the defendant's subs). There was also no evidence that the no steps were taken to protect the plaintiff's perineum during delivery. The defendants also relied on the expert evidence of Dr Aruku (DW9);

(b) there was no delay in treating the plaintiff's injury. In addition, the plaintiff's injury was attended to based on availability of an operating theatre ('OT');

(c) the advice and information given by the defendants to the plaintiff and her husband was sufficient to enable the patient to decide whether or not to accept the mode of treatmentproposed by DW3 and DW8. The plaintiff was also verbally counseled on the operation and risks. Consent of the plaintiff's husband was also obtained prior to DW3 performing the colostomy procedure on the plaintiff;

(d) the diagnosis and treatment of the plaintiff's perineal injuries by DW3 and DW8 was also correct as the treatment provided (in this case colostomy instead of primary repair of the plaintiff's perineum) had managed to heal the injuries completely; and

(e) there was no contractual relationship between the seventh defendant and the plaintiff. A

PRINCIPLES OF LAW APPLICABLE

[21] In determining the issues to be tried in the present case, I am guided by the principles of law relating to medical negligence as set out in the Federal Court decision in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438 where Raus Shariff CJ at p 609 of the judgment held as follows: B

> ... the test in *Rogers v Whitaker* and followed by this court in *Foo Fio Na* in regard to the standard of care in medical negligence is restricted only to the duty to advise of risk associated with any proposed treatment and does not extend to diagnosis and treatment. With regard to the standard of care for diagnosis or treatment, the *Bolam* test still applies subject to the qualifications as decided by the House of Lords in *Bolitho*. C D

[22] What is meant by the *Bolam* test can be seen in the following passage of the judgment of the English Court in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 re-produced below:

> ... A doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice merely because there is a body of opinion that takes a contrary view ... E F
>
> ... The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. G

[23] For purposes of clarity, the crucial passage in *Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority* [1997] 4 All ER 771 is also re-produced below, where it was held as follows:

> A doctor could be liable for negligence inrespect of a diagnosis and treatment despite a body of professional opinion sanctioning his conduct but where his professional opinion was not capable of withstanding logical analysis. In such situation, the court is entitled to hold that the body of opinion was not reasonable or responsible. H

[24] At the outset, I wish to state that the Federal Court in the *Zulhasnimar*'s case clearly recognises two broad categories involving medical practitioners (including doctors and/or nurses) namely: I

(a) the provision of advice and information to patients; and

(b) diagnosis and treatment.

[25] Under the heading of providing advice and information to patients, according to the Federal Court, the court is required to apply the standard that is expected of a healthcare provider by a reasonable patient or, in a particular case, by the patient concerned. In doing so, the court will have to consider what advice and information a patient would expect to be given before deciding whether or not to accept the offer by a healthcare practitioner of a particular mode of treatment and any reasonable alternatives.

[26] Under the heading of diagnosis and treatment, the Federal Court held that the standard of care applicable is that of the 'doctor' standard as stated in the *Bolam* test (subject to the *Bolitho* qualification). Suffice to say that so long as a defendant doctor's action does not fall short of the standard of care that is expected of an ordinarily skilled doctor in the same discipline as the defendant doctor, there cannot be negligence. In determining the standard of care applicable, the court must be first satisfied as to whether the expert opinion in support of a doctor's action is 'reasonable', 'respectable' and 'responsible', and stands up to 'logical analysis'. If the court is not so satisfied, then such opinion must be rejected.

[27] With reference to the liability of the owner/and or managers of the hospital involved, the owner or manager can be held:

(a) directly liable for a breach of the non-delegable duty of care owed to its patients; and

(b) vicariously liable, for the actions and omissions of its agents and employees, including independent contractors.

[28] Such was the case in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529 where the Federal Court, inter alia, held that the owners and managers of healthcare institutions are themselves providers of healthcare and therefore have a direct duty in law to ensure the safety of their patients. Such a duty is non-delegable because the owners and managers of a healthcare institution cannot escape their legal liability by delegating, not the existence, but the performance, of such duty to others, including independent contractors. The owner and managers also have a direct duty to ensure that there are systems in place for the safety of their patients. The failure to have such safe systems will also attract direct liability on the part of the owners and managers (see also *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2017] 1 LNS 2112).

[29] It is a worthwhile noting that under common law there is also direct liability for not having a proper and effective system as well as for organisational failures (see: *Bull and Another v Devon Area Health Authority* (1993) 4 Med LR 117 and *Lybert v Warrington Health Authority* (1996) 7 Med LR 71).

THE COURT'S ANALYSIS AND FINDINGS

[30] For purposes of brevity, this court's analysis and findings will be summed up based on the issues to be tried agreed by parties although not in identical sequence as re-produced in para [19] above.

A. Whether the plaintiff suffered any injury as claimed?

[31] Yes. The fact that the plaintiff had suffered a fourth degree tear was confirmed by DW3 who found a fourth degree perineal tear and a buttonhole tear at the rectum.

B. Whether the injuries suffered by the plaintiff was the result of an unavoidable complication?

[32] Based on the evidence adduced by both parties, I am of the view that there is insufficient evidence to show that the plaintiff's injuries were a result of unavoidable complication as contended by the defendants. Despite DW9's expert evidence on what may have caused the plaintiff's injuries, I am not convinced that the injuries suffered by the plaintiff was part of a normal process of labour of a baby.

[33] My reasons for finding so are as follows:

(i) the labour summary had already identified the fourth degree tear even before the plaintiff was sent for examination at the operating theatre;

(ii) the testimony of DW1 that the labour summary was filled in only by her and/or DW2. It is therefore most puzzling when neither of them knew who wrote the wordings '4th degree tear' on the labour summary;

(iii) the plaintiff had testified that Dr Lim (DW6) was the person who performed the episiotomy procedure. This was opposite to DW2's testimony that she was the person who performed the episiotomy. It is interesting to note that DW9's expert report states that it was DW6 who performed the episiotomy (see p 585 of the notes);

(iv) despite the labour summary stating that it was DW6 who delivered the baby, DW6 under cross-examination denied it. This was however rectified by DW6 in answer to questions posed by the court;

(v) the conflicting testimonies as to what transpired in the labour room, show that the delivery of the plaintiff's baby was not normal at all. Had that been the case, the evidence of DW1, DW2 and DW6 would have been the same and consistent with the labour summary;

(vi) the testimony by DW9 was unsubstantiated when he said that the plaintiff's vaginal tissue was friable (contrary to the testimony of DW2 who observed that the plaintiff's perineal tissues were not soft or friable, see p 256 of the notes of proceedings) and his remarks that fourth degree tears are normal complications during labour (this was not supported by defendants' other expert witness; DW10); and

(vii) last but not least, I agree with the submission of the plaintiff that there was no explanation given by any of the treating doctors to the plaintiff as to how the fourth degree tear happened.

C. Whether the defendants had acted with due care and skill in attending to the plaintiff

[34] My finding on this issue is in three parts. The first part is the delivery stage. The second part involves the post-delivery stage which includes the suturing of the episiotomy wound and the examination of the injuries in the OT. The third stage is the post examination stage which includes the medical treatment accorded to the plaintiff.

[35] With reference to the delivery stage, my review of the evidence finds that there was negligence. Firstly, none of the three persons: DW1, DW2 and DW6 who conducted delivery of the plaintiff's baby, knew how the fourth degree tear was caused. The situation must have been so chaotic due to reasons only known to them that DW6 could not even remember that he was the person who delivered the baby. In view of the fact that the defendants had the labour summary in their possession, I find DW6's memory lapse disturbing. Similarly, the plaintiff's unchallenged testimony on the fact that the episiotomy was wrongly performed by DW6 has not only discredited the testimony of DW6, DW1 and DW2, it had the effect of an admission for reasons stated in para [33](iii) above.

[36] At stage two, DW1 had sutured the episiotomy tear. Thereafter, DW1 discovered a pocket in the plaintiff's anus. She then removed the sutures and re-sutured the tear. This act of suturing and re-suturing not only was contrary to the Klang Hospital Guidelines but also caused great pain to the plaintiff (see testimony of DW8 at p 531 of the notes of proceedings where she said that a fourth degree tear is painful on the victim even with linocaine).

[37] Having found the pocket despite the re-suturing being done, DW1 then consulted DW7 who did her own examination upon which she recorded that the 'Small episiotomy wound' extended to the plaintiff's anal verge. DW4 also recorded 'sutures felt with potential space' during the per rectal examination of the plaintiff. These findings are consistent with a third or fourth degree tear. However, DW7 went on to diagnose that the condition anus of the plaintiff as 'anal sphincter/mucosa intact'. As a result, DW7 concluded that there was no third or fourth degree tear. It was however fortunate that DW7 instructed for the plaintiff to be examined under anesthesia in the OT. This was at 4.10pm.

[38] Unfortunately for the plaintiff, she was only sent to the OT at 6pm. Thereafter, she was examined by DW8 only at 7.10pm. It was during this examination that DW8 discovered the full extent of the plaintiff's injuries. At this juncture, I am compelled to state that I am unable to agree with the defendants' contention that there was no delay in sending the plaintiff for examination.

[39] I take the view that there was a delay in recognising the fourth degree tear suffered by the plaintiff. This delay caused the plaintiff's examination at the OT to be categorised under the heading of 'emergency' instead of 'urgent' (see p 715 of the notes of proceedings). Had the fourth degree tear been recognised early, the plaintiff would have been sent immediately to OT.

[40] Based on the testimony of DW8, I have no doubt that the delay caused the plaintiff's vaginal tissue to be inflamed, contaminated and friable, which made the procedure of primary repair difficult. In this regard, both DW1, DW2, DW6 and DW7 had not acted with the standard due care and skill required as required under the *Bolam* test.

[41] As for the third stage, it is my finding that DW3 did not give adequate advice and information to the plaintiff as to the choice of treatment available to the plaintiff. In fact, DW3 only informed the plaintiff of one available option which is the colostomy procedure. Even DW3 himself admitted that primary repair of the plaintiff's injury was another option. In this sense, DW3 had violated patient autonomy. DW3 had also failed to give adequate information to the plaintiff as to the after effect of the colostomy procedure and also a thorough estimate as to how long it will take before the reverse colostomy procedure can be performed. This is contrary to the test formulated in *Rogers v Whitaker*.

[42] Notwithstanding the finding that DW3 had violated patient autonomy, I am of the view that DW3 had performed both the colostomy and the reverse colostomy procedure with a high degree of skill and care. Save for DW3's

violation of patient autonomy, I am not prepared to hold DW3 guilty of medical negligence. To my mind, DW3 was a perfectionist who wanted the best possible treatment which to his mind would be most appropriate to the plaintiff and not what the plaintiff thinks would be her choice. The pursuit of perfection can be further seen in DW3's refusal to perform reverse colostomy procedure on the plaintiff until the anal tone of the plaintiff had completely healed.

D. Whether the defendants had taken appropriate measures to deal with the complications which arose

[43] On this issue, with the exception of putting the plaintiff on contraceptives despite her informing the attending doctors that she is not able to have sex with her husband since after giving birth, I do find that the defendants had taken appropriate measures to deal with the complications that arose. This included the counselling sessions to the plaintiff and her husband after the colostomy procedure wherein the counseling sessions continued until the reverse colostomy procedure.

E. Whether the diagnosis, management. care, treatment and advice provided to the plaintiff by the first to seventh defendants was in accordance with the generally approved and accepted procedure amongst medical practitioners of the relevant specialties practicing in Klang, Selangor in 2014

[44] On this issue, it is my finding that DW1, DW2 and DW3 had failed to follow the Klang Hospital Nursing SOP, O&G Dept when they failed to protect the plaintiff's perineum to prevent the possibility of an extended tear.

[45] The Klang Hospital Guidelines for recognition and repair of third/fourth degree tears at p 2 clearly provides as follows:

> All skin tears that extend to the anal margin are 3rd degree tears until proven otherwise and hence should be examined by a senior medical officer or specialist.

In this regard, it is my finding that DW1 failed to adhere to the above guidelines when she performed re-suturing upon discovery of the pocket in the plaintiff's anus instead of having the tear examined by a senior medical officer or specialist prior to re-suturing.

[46] Under the heading of 'Principles of Repair', the guideline provides:

> All 3rd/4th degree tears should be repaired in theatre under general or regional anaesthesia as this ensures good access as well as relaxation of the muscle during repair.

Repair should be performed by specialist or senior medical officer who is trained and competent in repair procedures.

Once again, DW1 failed to follow the hospital's guidelines. I can only assume that if they guidelines were adhered to, the injuries suffered by the plaintiff could have been prevented.

[47] With reference to the fourth defendant (DW4), it is my finding that her conclusion hat there was no third or fourth degree tear was utterly careless. I opine so as despite her notes stating that the plaintiff was uncooperative during examination, DW4 had in her notes described the injury suffered by the plaintiff as a 'small episiotomy wound' and also that the tear extended to the plaintiff's anal verge. DW4 also recorded 'sutures felt with potential space' during the per rectal examination of the plaintiff but diagnosed the condition of the anus of the plaintiff as 'anal sphincter/mucosa intact'. These contradictory findings caused the plaintiff's injuries to be classified as an 'emergency' case instead of 'urgent' surgery causing delay to the plaintiff's examination and treatment of injuries. Had the plaintiff's injury been properly classified as urgent, the plaintiff need not have waited for three hours to be examined. The delay in attending to the plaintiff's injuries caused her perineal tissues to be contaminated, inflamed and friable. Hence, DW3 and DW8 took the view that primary repair of the injuries without the creation of a colostomy would not be in the plaintiff's interest.

[48] With the exception of the failure to explain the treatment options available to the plaintiff, I am of the view that the diagnosis, management, care, treatment and advice provided to the plaintiff by the fifth to seventh defendants was in accordance with the generally approved and accepted procedure amongst medical practitioners of the relevant specialties practicing in Klang, Selangor in 2014.

F. Whether the diagnosis, management, care, treatment and advice provided to the plaintiff at the seventh defendant's hospital was in accordance with the generally approved and accepted practice in Malaysia

[49] My answer to this issue is the same for issue E as stated in paras [44]–[48] above.

G. Whether a binding contractual relationship existed as between the seventh defendant and the plaintiff

[50] On this issue, being the ultimate owner of the hospital, the seventh defendant has a direct duty to ensure the safety of the plaintiff (see the case of *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal*).

H. If a binding contractual relationship existed between the seventh defendant and the plaintiff, whether the seventh defendant had carried out its contractual duties to the plaintiff in a reasonable and responsible manner

[51] My answer to this issue is the same for issue E as stated in paras [44]–[48] above.

I. If liability is established against the defendants and each of them, whether the plaintiff will be entitled to the special damages, general damages (including as aggravated), interest and costs as pleaded

[52] Based on the findings stated above and with the exception of the fifth and sixth defendant (namely DW8 and DW3), I am constraint to hold that the plaintiff is entitled to the special damages, general damages (including as aggravated), interest and costs as pleaded.

QUANTUM

[53] In respect of quantum of damages to be awarded to the successful plaintiff, I am guided by the decision of Raja Azlan Shah CJ (as he then was) in the case of *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292, where the Federal Court held that in awarding damages for injury arising from negligence, the plaintiff is entitled to special damages, pre-trial damages, general damages for pain and suffering and the loss of the amenities of life, and cost of future care.

'... the purpose of damages is to try, so far humanly possible, to put the victim back to the position he would have been in but for the accident. The damages must be fair, adequate and not excessive ...'. It must be to compensate the plaintiff and not to punish the defendant.

A. Special damages

[54] Under the heading of special damages, the plaintiff is claiming for the following:

(a) cost of medical treatment and expenses in the sum of RM2,409.50;

(b) traveling expenses in the sum of RM1,500;

(c) cost of colostomy bags in the sum of RM18,480;

(d) loss of earnings in the sum of RM33,000 (RM1,500 x 22 months); and

(e) value of care for 12 months in the sum of RM12,000 (RM1,000 per month).

[55] In respect of cost of medical treatment at Poliklinik & Surgeri Meru Jaya, the receipts for the treatment was duly proven through PW3. The treatment given was also proper as admitted by DW4 and DW10. The plaintiff's claim is therefore allowed as prayed for.

[56] In respect of the travelling expenses, I am of the view that the amount claimed is reasonable. The plaintiff's claim for the sum of RM1,500 is allowed.

[57] In respect of the colostomy bags, I am not agreeable with the defendant's contention that the colostomy bags can be washed and re-used. Though this can be done, it would be unhygienic and may lead to further complications on the plaintiff's healing process. Although not all receipts for the bags were produced, the plaintiff had given sufficient explanation that she did not keep the receipts as she did not anticipate taking up a suit against the defendants. The frequency of usage of the colostomy bags is also reasonable. The plaintiff's claim under this heading is allowed in full (see the Court of Appeal decision in *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102; [2017] 3 CLJ 311).

[58] With reference to the plaintiff's claim for loss of earnings, I do take note of the defendant's submission that the plaintiff's status as a refugee does not allow her to gain employment. Despite such embargo placed on the plaintiff, in reality most refuges in Malaysia including the plaintiff, have no choice but to work in order to survive. In this regard, the plaintiff's earnings in an electric manufacturing factory cannot be said to be derived from illegal activities. As longas that remains the case, the plaintiff is entitled to claim for loss of earnings (see the judgment of Siti Normah Yaakob JCA, as she then was in *Tay Lye Seng & Anor v Nazori bin Teh & Anor* [1998] 3 MLJ 873). Be that as it may, I am of the view that the plaintiff's claim under this heading was not proven in full (as no payslips were produced and neither were her employers called to give evidence). Under this circumstance, this court is only allowing 50% of the amount claimed.

[59] In respect of the plaintiff's claim for value of care, such a claim has on numerous occasions been allowed by our local courts (see *Mayathevan*'s case). In the present case, the plaintiff is claiming for the value of care she received from her mother and husband during the time she was recovering from her injuries. Without the assistance of her mother and husband, it would not be possible for the plaintiff to take care of her baby as well as herself. In this regard, I am of the view that the value of care for eight months is reasonable.

B. General damages for pain and suffering and loss of amenities of life

[60] On the plaintiff's claim for general damages, I do take cognisance that the nature of the injury is not too complicated in comparison with cases of loss of limb or permanent disability. Notwithstanding so, it cannot be denied that there is pain and suffering and loss of amenities for seven months. In this regard, DW8's testimony that a fourth degree tear is painful even with linocaine (see p 532 of the notes).

[61] Whilst the injury suffered by th plaintiff had healed completely, the defendants' witnesses did concede that there is future risk of incontinence.

[62] In respect of the plaintiff's worry about having sex with her husband due to the phobia of pain suffered by her as a result of the injuries. I am of the view that this issue can be overcome with the passing of time and proper counseling by the appropriate doctors at the hospital.

[63] Having reviewed the authorities furnished by counsel for both the plaintiff and the defendants on the amount of damages payable under this category, I am inclined to agree with the award of damages awarded in the case of *Sheela Christina Nair v Regency Specialist Hospital Sdn Bhd & Ors* [2016] MLJU 1899; [2016] 9 CLJ 267 compared to the case of *Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor* [2012] 4 MLJ 260; [2013] 1 CLJ 699 referred by the defendants. I therefore award a lump sum amount of RM250,000 to the plaintiff (compared to the sum of RM300,000 sought by the plaintiff's solicitors) in respect of pain and suffering, loss of amenities for seven months and the permanent scars in her perineum and abdomen.

C. Aggravated damages

[64] On the plaintiff's claim for aggravated damages, I am guided by the following authorities:

(a) *Rookes v Barnard* [1964] AC 1129

> 'The first category is oppressive, arbitrary or unconstitutional action by the servants of the government' ... and 'cases in the second category are those in which the defendant's conduct has been cancelled by him to make a profit for himself which may well exceed the compensation payable to the plaintiff ...' and to these two categories which are established as part of the common law there must be of course be added any category in which exemplary damages are expressly authorised by statute.

(b) *Cassell & Co Ltd v Broome and another* [1972] AC 1027

> In a case in which exemplary damages are appropriate, a jury should be

> directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award a larger sum.

(c) *A v Bottrill* [2003] 1 AC 449

> Cases satisfying the outrageousness will usually involve intentional wrongdoing with, additionally, an element of flagrancy or cynicism or oppression or the like; something additional rendering the wrongdoing or the manner or circumstances in which it was committed to particularly appalling.

[65] The English authorities cited above are no stranger to the Malaysian courts and have been applied in a number of cases including the Federal Court decision in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282, where it was held that:

> In appropriate cases, substantial damages may be awarded for any indignity, discomfort or inconvenience suffered; even aggravated damages may be awarded in the light of the motive or *conduct of the tortfeasor* (*Rookes v Barnard* [1964] AC 1129 (HL) at pp 1121–1123; *W v Meah* [1986] 1 All ER 935). As an analogy, in *Appleton v Garret* [1996] PIQR P 1 aggravated damages were given to patients of a dentist for injury to feelings, mental distress, anger and indignation upon learning that much of the dental treatment given to them was unnecessary and to a large extent performed on healthy teeth. The dentist had deliberately and in bad faith concealed from them the rue condition of their teeth so that he could carry out dental work for profit ... (Emphasis added.)

(See also *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2017] 1 LNS 2112).

[66] With reference to the case at hand, l wish to state that I found the following conduct of the defendants and witnesses in defending the case appalling:

(a) DW6 lied under oath when he said that he did not undertake delivery of the baby and said the lighting in the labour ward was insufficient when it was not the case;

(b) non-compliance with the hospitals' own guidelines;

(c) DW3 violating the patient autonomy when he failed to inform the plaintiff of the choices of treatment available;

(d) the testimony of DW9 who despite being given permission to sit at the bar table to assist the defendants to understand the medical issues which

arose from the evidence of witnesses called to testify, had taken the role of instructing solicitor to the defendant's counsel instead of an independent expert as required under O 40 of the Rules of Court 2012. DW9's unsubstantiated testimony that the plaintiff's vaginal tissue was friable (contrary to the testimony of DW2 who observed that the plaintiff's perineal tissues were not soft or friable, see p 256 of the notes of proceedings) and caused the fourth degree tear and his ingenious testimony that there are good and bad guidelines wherein the Klang Hospital Guidelines is a bad guideline (*the matters listed above are non-exhaustive*); and

(e) the security for costs application which was filed midway of the trial (which to my mind was a desperate attempt to stifle litigation after having seen the evidence adduced by the plaintiff).

[67] In light of the conduct listed above, I am therefore constraint to award aggravated damages in the sum of RM75,000.

D. Interest

[68] On the issue of interest, the plaintiff's had prayed for:

(a) interest at the rate of 4%pa on special damages from the date of the incident on 11 August 2014 up to the date of judgment;

(b) interest at the rate of 8%pa on pre-trial and general damages from the date of service of the writ (7 September 2016) up to the date of judgment; and

(c) interest at the rate of 5%pa on the judgment sum including cost from the date of the judgment up to the date of payment.

[69] Having examined the provisions of O 42 r 12 of the RC 2012 and the provision of s 11 of the Civil Law Act 1956, I find no reason to deny the plaintiff's claim for interest for each of the category mentioned in para [54] above.

E. Costs

[70] With reference to the issue of costs, I am of the view that an amount of RM100,000 as getting up fees is reasonable. The trial itself took over ten days and over a period of almost one month whilst the suit commenced in the month of September 2016. In fact, the defendants themselves had in their security for cost application requested for the sum of RM100,000 as security towards costs of the trial.

ORDERS PRONOUNCED

[71] Based on the findings stated above, the plaintiff's claim against the first, second, third, fourth and seventh defendant is allowed accordingly, whereas the claim against the fifth and sixth defendant is dismissed. This court also makes the following orders:

Special damages		RM
(a) hospital and medical expenses		2,409.50
(b) travelling expenses		1,500
(c) costof colostomy bags		18,480
(d) loss or earnings		16,500
(e) value of care		*8,000*
	Subtotal	46,889.50
General damages for pain and suffering and loss of amenities of life		250,000
Aggravated damages		*75,000*
	Total	*371,889.50*
Costs		
(a) getting-up fee		100,000
(b) out of pocket expenses		*8,759*
	Total	*108,759.00*

Interest:

(a) interest at the rate of 4%pa on special damages from the date of the incident on 11 August 2014 up to the date of judgment dated 9 January 2019;

(b) interest at the rate of 8%pa on pre-trial and general damages from the date of service of the writ (13 September 2016) up to the date of judgment of 9 January 2019; and

(c) interest at the rate of 5%pa on the judgment sum including cost from the date of the judgment dated 9 January 2019 up to the full realisation.

Order accordingly.

Reported by Mohd Kamarul Anwar